Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

KARL RAINEY,

Petitioner,

v.

DAVID DI GUGLIELMO,
SUPERINTENDENT,
-and-
DISTRICT ATTORNEY
OF THE COUNTY OF PHILADELPHIA,
-and-
ATTORNEY GENERAL
COMMONWEALTH OF PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the federal courts below, in direct and serious conflict with the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), apply an erroneous, sufficiency-of-the-evidence standard when evaluating the prejudice which resulted from trial counsel's ineffectiveness?

II. Did the Courts below abdicate their responsibility to remedy the Superior Court of Pennsylvania's clearly unreasonable misapplication of *Strickland v. Washington*, 466 U.S. 668 (1984) – as well its clearly erroneous factual determinations which were directly contrary to the evidence of record – in a case in which Petitioner's claim to have acted in self defense was totally emasculated by trial counsel's ineffectiveness?

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Petitioner Karl R[illegible]y respectfully petitions for a writ of certiorari to review the final order of the United States Court of Appeals for the Third Circuit denying Petitioner's application for a certificate of appealability in this case.

OPINIONS BELOW

The May 18, 2007 order of the United States Court of Appeals for the Third Circuit, of which review is sought, is unreported and is reprinted in the Appendix hereto at pp. 1a-2a.

Neither the September 6, 2007 memorandum opinion and order of the United States District Court for the Eastern District of Pennsylvania, John R. Padova, J., nor the January 12, 2006 report and recommendation of United States Magistrate Judge Peter B. Scuderi, have been reported in the Federal Supplement. Both are, however, unofficially reported at 2006 WL 2588747. The District Court's opinion and order are reprinted in the Appendix hereto at pp. 3a-29a. The Magistrate Judge's report and recommendation are reprinted in the Appendix hereto at pp. 30a-43a.

JURISDICTION

The Court of Appeals entered the order denying Petitioner's application for a certificate of appealability on May 18, 2007. No petition for re-hearing was sought. This Court has jurisdiction to review the aforesaid order under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236 (1998).

On August 20, 2007, Justice Souter ordered that the time for filing this petition for writ of certiorari be extended to and including October 15, 2007.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV, Section 1:

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 (a), (c)(1)-(2):

> (a) In a habeas corpus proceeding or a proceeding before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> ....
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254(a),(d), (e)(1):

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> ....
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

I. Procedural History; Jurisdiction

Petitioner is serving a life sentence for allegedly premeditated, first degree murder, following his 1995 conviction by a jury in the Court of Common Pleas of Philadelphia County, *Commonwealth of Pennsylvania v. Karl Rainey*, No. CP 9412-0717. Petitioner's direct appeal was unsuccessful.[1] Subsequently, Petitioner initiated a proceeding under the Pennsylvania Post Conviction Relief Act which was similarly unsuccessful both in the Court of Common Pleas and on appeal.[2]

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1. *See* memorandum opinion of the Superior Court of Pennsylvania on direct appeal, No. 4275 PHL 1995, January 16, 1997, text unpublished but disposition reported at 698 A.2d 110 (Table) – reprinted in the Appendix hereto at pp. 60a-63a; order of the Supreme Court of Pennsylvania, No. 69 E.D.Alloc.Dkt. 1997, November 3, 1997 (denying petition for allowance of appeal), text unpublished but disposition reported at 550 Pa. 681, 704 A.2d 637 (Table).

2. *See* opinion of the Court of Common Pleas of Philadelphia County, Pennsylvania, No. CP 9412-0717, November 17, 2003 (Mazzola, J.) (denying post conviction collateral relief), (Cont'd)

Petitioner then filed a timely petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, invoking jurisdiction under 28 U.S.C. § 2254. The District Court ultimately denied relief and refused to issue a certificate of appealability. Petitioner then applied for a certificate of appealability in the United States Court of Appeals for the Third Circuit, which application was denied on May 18, 2007 "for essentially the reasons discussed by the District Court." Appendix, pp. 1a-2a.

II. Factual Background

A. Eyewitness Testimony

The Commonwealth's theory of the case was that Petitioner and Petitioner alone shot a total of 8 bullets into the decedent Kenneth White and another three into his friend Ervin Boyd. Even though White had five frontal wounds of .380 caliber, and three back wounds of 9 millimeter caliber, the Commonwealth argued that both types of ammunition were fired by Petitioner from a single gun. This argument was based upon the highly

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(Cont'd)

unpublished and unreported – reprinted in the Appendix hereto at pp. 53a-59a; memorandum opinion of the Superior Court of Pennsylvania, No. 2861 EDA 2002, September 9, 2004 (Del Sole, P.J., Panella and Beck, JJ.) (affirming order of the Court of Common Pleas), text unpublished but disposition reported at 863 A.2d 1229 (Table) – reprinted in the Appendix hereto at pp. 44a-52a; order of the Supreme Court of Pennsylvania, No. 499 EAL 2004, February 22, 2005 (denying petition for allowance of appeal), text unpublished but disposition reported at 582 Pa. 673, 868 A.2d 1199 (Table).

speculative testimony of ballistics examiner Lt. Mark Stephan, that it was possible to fire 9 millimeter ammunition from certain cheaply made .380 caliber firearms. *See* N.T. 8/8/95, pp. 78-109. This, along with the circumstance that three of White's eight gunshot wounds were wounds to the back with an upward trajectory, was used by the Cor monwealth to relentlessly argue in favor of premeditation and against Petitioner's self-defense claims. *See, e.g.*, N.T. 8/7/95 pp. 30, 32; 8/9/95, pp. 106-107, 111-116, 119-120.

Petitioner argued, more logically, that although he was indeed responsible for at least two of White's frontal wounds, having shot White while in legitimate fear for his life, he was not responsible for the additional wounds to the back which had been apparently inflicted while White was down on the ground. *See, e.g.*, N.T. 8/9/95, pp. 58-61, 100-102. In other words, Petitioner denied premeditated murder, and argued a version of circumstances that would have amounted, at worst, to voluntary manslaughter under Pennsylvania law.

Testimony showed that the victim, White, had become angry at Petitioner some weeks earlier for complaining about White's mistreatment of Petitioner's son's mother. This dispute ended in a fist fight, after which Petitioner was warned by at least two people that White was known to be dangerous, to often carry a gun, and to be willing to use it. Afraid for his safety, Petitioner purchased a .380 caliber gun, which he had on his person in the early morning hours of November 19, 1994.

At that time, Petitioner was leaving a bar when he encountered White, who was on his way in. White turned

around, exited the bar, and followed Petitioner down the street, calling to him angrily that their former dispute was not over. White and some friends (including the other victim who was injured but not killed, Ervin Boyd) eventually surrounded Petitioner, preventing him from reaching his car. Because of the warnings he had previously received, Petitioner was already in fear for his life – and when White and Boyd both appeared to reach inside their jackets, he drew his gun and shot off several rounds before eventually ducking in between some parked cars. It was at this point, after he had taken cover, that he was shocked to see a friend of his, Kevin Williams, pumping more shots into White's body, despite the fact that he was already down and lying on the ground. N.T. 8/8/95, pp. 50-75, 79, 81-83, 86 (Petitioner's testimony).

At his trial, Petitioner argued that it was Williams who accounted for the 9 millimeter fired cartridge cases found on the street, and the two 9 millimeter bullets found in White's body, both in wounds inflicted from the back. *See, e.g.*, without limitation, N.T. 8/9/95, pp. 23-106. Besides his own testimony to this effect, Petitioner offered character witnesses, N.T. 8/9/95, pp. 3-18, the testimony of Joy King corroborating the original dispute between Petitioner and White, N.T. 8/9/95, pp. 23-32, and the testimony of Kenneth White's own friend, James Stanton, to the effect that it was indeed White who initiated the trouble on the night of the shooting, that Boyd had a reputation for carrying a gun, and that just before Petitioner began to shoot, White and Boyd had Petitioner boxed in so that he was unable to get to his car, while White demanded a fight. N.T. 8/9/95, pp. 35-39, 45-47.

Based on Boyd's account of the incident, however, and the testimony of another witness Kevin White (unrelated to the decedent Ke*nneth* White), the Commonwealth argued that Williams was nothing more than a "phantom," and that the only actual shooter was Petitioner. *See* N.T. 8/9/95, pp. 116-120.

Boyd and the other Commonwealth eyewitness, Kevin White (unrelated to the victim Ke*nneth* White) confirmed Petitioner's and Stanton's testimony that it was White who was pursing Petitioner and insisting upon renewing the argument, while Petitioner attempted to get to his car and leave. *See* N.T. 8/7/95, pp. 90-92, 114-115 (Boyd); 8/8/95, pp. 7-10 (Kevin White). Boyd, however, claimed that Petitioner was the person doing all the shooting – although on cross-examination he admitted that he had not actually been in a position to see the final shots. N.T. 8/7/95, pp. 95-90, 100, 122-124.[3]

Kevin White, a disc jockey who had been working at the bar that night, testified that he heard gunfire while he was outside making a phone call. Turning to look, he saw a man standing and firing a gun in a downward direction. After ducking back into the bar to warn

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3. Boyd also admitted that he had been drinking prior to the incident. N.T. 8/7/95, pp. 110-111. At the time of his testimony, at age 21, he had already been convicted of robberies, forgeries and drug offenses, and was presently incarcerated on some "wanted cards." N.T. 8/7/95, pp. 103-107. Under Pennsylvania law, a witness' general truthfulness may be impeached by reference to previous *crimen falsi* convictions – including convictions for robbery and forgery. *Commonwealth v. Penn*, 497 Pa. 232, 244, 439 A.2d 1154, 1160 (1982); *Commonwealth v. Pilosky*, 362 A.2d 253, 257 (Pa.Super. 1976).

patrons, during which time he heard a couple more shots, White claimed to have returned outside to find the same man standing in the same location, still shooting downward. N.T. 8/8/95, pp. 5, 12-13, 23-25.

In addition to the obvious difficulties of rationalizing this account with the actual bullet wounds – all but three of which had a trajectory consistent with having been inflicted while the decedent was on his feet and moving around – and the unlikelihood that the entire shooting was spread over such a long period of time – Kevin White's testimony was also gravely weakened because the description he gave to the police was not congruent with Petitioner's actual physical characteristics. Indeed, he was unable to actually identify Petitioner as the shooter. His claim, moreover, that one and the same man was shooting both times, was ultimately shown, after cross examination, to have rested on one and only basis – that both shooters, supposedly, wore the same length coat. N.T. 8/8/95, pp. 16, 21-22, 25, 34-36.

B. Crime Scene and Forensic Evidence

Found near the body of Kenneth White were four fired 9 millimeter cartridge casings. Five .380 automatic fired cartridge cases, 3 on the street and 2 on the sidewalk, were found near the streetlight. Also found elsewhere on the street were two live 9 millimeter shells which had not been fired. N.T. 8/7/95, pp. 59, 61-62, 67.

Examination of White's body revealed eight different gunshots – none of which were close-range wounds. N.T. 8/8/95, pp. 113, 127-129. In the order identified by the testifying pathologist, Dr. Stephanie Mills, these were as follows:

1. A frontal wound to the left chest, running rightwards, backwards and downwards to emerge mid-flank on the victim's side, perforating the left kidney. N.T. 8/8/95, pp. 114-115.

2. A frontal wound to the right lower chest, running leftward, forward and downward, and exiting on the medial surface of the right abdomen, causing no major damage to internal organs. N.T. 8/8/95, pp. 116-117.

3. A frontal wound to the side of the right lower abdomen, running leftward and forward and exiting on the lateral surface of the right lower abdomen, causing a small perforation of the small intestine. N.T. 8/8/95, pp. 118-119.

4. A wound **to the upper left back** near the shoulder, running upward and slightly forward, causing no major injury. **A bullet was recovered from this wound.** N.T. 8/8/95, pp. 119-121.

5. A wound **to the lower left back,** rightward and upward, exiting from the shoulder. N.T. 8/8/95, p. 121.

6. A wound to the forearm near the elbow, upward and leftward, probably a defensive wound. N.T. 8/8/95, pp. 121-122.

7. A **penetrating (not perforating) frontal wound** to the left side of the lower chest, leftward, downward and backward, which caused a perforation of the lung, and consequent hemorrhaging. N.T. 8/8/95, p. 123.

8. A **wound to the lower left back**, upward and rightward, which perforated the left lobe of the lung and also caused damage to Mr. White's kidney and extensive bleeding. **A bullet was recovered from the path of this wound.** N.T. 8/8/95, pp. 123-125. Contrary to the Commonwealth's repeated, false and misleading argument to the jury, this bullet, although lodged in the back at the midline, **was the result of a frontal wound.** *See* N.T. 8/8/95, p. 123, lines 12-13. It was also, according to Dr. Mills' testimony, **the wound most seriously contributing to Mr. White's death.** N.T. 8/8/95, pp. 123-125.

Thus, despite the fact that the formal, overall cause of death was given as "multiple gunshot wounds to the chest and the abdomen and the back" – N.T. 8/8/95, pp. 73, 127 – it is clear that Dr. Mills specifically identified *one of the wounds to the back* as having most seriously contributed to Kenneth White's death.

As was vigorously argued by the attorney for the Commonwealth, the three gunshots entering the back had an upward and rightward trajectory, suggesting that the victim may have been shot from above and behind while he was stationary and down on the ground, whereas the wounds entering from the front were downward and variable from left to right, suggesting that the victim was, at that point, a moving target. N.T. 8/8/95, pp. 125-126.

The Commonwealth completely downplayed, by contrast, the very telling circumstances that (a) the only bullet recovered from a *frontal* wound was a .380 caliber bullet; (b) the two bullets recovered from two out of three of White's wounds *to the back* were 9 millimeter bullets; and (c) Petitioner's gun was a .380 weapon. *See* N.T. 8/8/95, pp. 96-97.[4] From these circumstances, Petitioner reasonably argued that he himself shot at White from the front – while cornered and believing that self-defense was needed – but that the wounds to the back, including the wound most fatal to White, were inflicted during the ensuing melee by Kevin White, gratuitously, and not by any request, conspiracy or combination with Petitioner.

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4. Lieutenant Stephan's testimony at N.T. 8/8/95, p. 96 established that the two bullets recovered from White's upper back were 9 millimeter Luger ammunition – clearly corresponding to the 4th and 8th wounds described by Dr. Mills at N.T. 8/8/95, pp. 119-121, 123-125. Similarly, Lieutenant Stephan testified that the bullet recovered from White's midline lower back was .380 automatic ammunition – clearly corresponding to the 7th wound described by Dr. Mills, which was the only other wound from which a bullet did not exit. N.T. 8/8/95, pp. 97, 123.

Despite the fact that the .380 caliber bullet could only have been recovered from the *frontal* wound, number 7, the prosecutor consistently and deceptively argued to the jury that this bullet was retrieved from a shot *in the back*. *See* N.T. 8/9/95, pp. 86-89, 106, 113-115. *See also* similarly deceptive cross-examination and trickery of Petitioner at N.T. 8/9/95, pp. 86-89. The fact remains, however, that the testimony of Dr. Mills, combined with the testimony of Lt. Stephan, clearly establishes that the two nine millimeter bullets were recovered from wounds to the back, and that the .380 bullet was recovered, lodged *in* the back as a result of a *frontal* gunshot. *Defense counsel did absolutely nothing to correct this error.*

In an attempt to discredit this self defense claim, the Commonwealth had Lt. Stephan give expert ballistics testimony to the effect that although the two different caliber bullets could just as easily have come from two different caliber guns, N.T. 8/8/95, pp. 105-106, *and although there were insufficient identifying characteristics to permit any conclusion about whether they did or not,* it was nevertheless *possible* that a single assailant loaded his .380 firearm with some .380 ammunition, followed by some less-well-fitting 9 millimeter ammunition, and then fired all eight rounds. N.T. 8/8/95, pp. 88-89, 94-95, 97-98, 103-105.

In support of this suggestion, the only "evidence" Lt. Stephan was able to offer was (a) the fact that he, on a single occasion, had successfully fired 9 millimeter ammunition from a single, cheaply made, California Rico .380 firearm, and (b) the fact that the two live 9 millimeter rounds found on the street in the vicinity of the shooting had deformities which *might* have been caused by being ejected from a weapon with a feed problem. N.T. 8/8/95, pp. 88-94, 104-105.

Nonetheless, based on this testimony, the Commonwealth urged the jury to dismiss Mr. Williams as nothing but a "phantom," created by Petitioner as an eleventh hour fabrication, and to convict Petitioner of premeditated, first degree murder on the theory that he fired all eight shots into White. *See* N.T. 8/9/95, pp. 116-117.

C. Offers of Proof and Testimony in the Pennsylvania Post Conviction Proceedings

Petitioner attached to his amended petition for relief under the Pennsylvania Post Conviction Relief Act (filed June 8, 2000), an affidavit from his brother Kurtis Rainey, who was, at the time, an officer with the Coatesville, Pennsylvania police department. In this affidavit, Officer Rainey stated under oath (a) that on the morning of November 19, 1994, Kevin Williams told him that he had shot the decedent, Kenneth White; (b) that Williams, at the time, had a 9 millimeter pistol; (c) that Petitioner, at the time, had a .380 firearm; and (d) that Petitioner, on that same morning, told a version of the events which was consistent with his testimony at trial. Officer Rainey's affidavit also confirmed that he had informed Petitioner's trial attorney of these facts, had indicated a willingness to testify on Petitioner's behalf, and was in fact present and available at the trial. *See also* testimony of Kurtis Rainey, 6/21/01, pp. 32-36 (Rainey was prepared to testify to Kevin Williams' statement and to his possession of a 9 millimeter gun on the morning of the killing; offered to help find Williams but was never asked; attended every day of the trial; was told by Mr. Greenberg that his testimony would be "prejudicial").

Counsel confirmed that he did know of Officer Rainey's potential testimony. He explained his failure to use that testimony (a) because he thought that its use would present a hearsay problem, since he had been unable to locate Kevin Williams himself; and (b) because he thought "the bias of Kurtis Rainey would be harmful to his brother Karl given the fact that they were brothers." N.T. 6/21/01, pp. 6-7, 9-11.

Petitioner also attached to his PCRA petition expert evaluation proposals from firearms experts John H. Dillon, Jr., and B.L. Jennings, Inc. – which together indicated that a more thorough examination of the ballistics evidence should have been done on behalf of the defense, that only certain of the earlier manufactured Bryco pistols could be forced to fire 9 millimeter ammunition, and that with well over a million similar .380 pistols extant, the physical characteristics of the shells and bullets found at the scene or in Kenneth White's body could quite easily have been produced by two separate .380 firearms.

D. Additional Offer of Proof in Habeas Proceeding

In the District Court, Petitioner submitted an expert evaluation of Lt. Stephan's testimony from a well-qualified expert, Gerald R. Styers, which concluded that:

(a) A defense expert should have performed an independent examination of the ballistics evidence, including comparison of marks produced by the firing pin, breech face, extractor, ejector, chamber, magazine and slide scuff, since Lt. Stephan testified only about examining the firing pin impressions;

(b) Defense counsel, with the help of an expert ballistician for the defense, could and should have challenged the testimony of Lt. Stephan that the deformed nine millimeter live rounds found on the street were indicative of having been chambered into a .380 automatic firearm – because there were several other possible reasons for such deformity, including a faulty magazine, bad feed ramp or a dirty firearm;

(c) There was no scientific basis for the suggestion that the nine millimeter and .380 caliber bullets were fired from a single gun – rendering Lt. Stephan's testimony highly speculative;

(d) The jury should have been told in contradiction of the Commonwealth's argument that although it is not impossible to fire nine millimeter Luger cartridges in a .380 automatic pistol, it is highly unlikely; and

(e) If nine millimeter ammunition had been fired from a .380 automatic pistol, there should have been indications as to this fact on the *fired* 9mm Luger cartridge cases, indicating they were fired in a shortened chamber. Since Lt. Stephan testified only to the deformities on the *live* cartridges, but made no comment on the fired cartridge cases, competent counsel with the help of a defense expert ought to have had the *fired* cartridge cases examined, and/or should have pointed out to the jury Lt. Stephan's omission.

Report of Gerald R. Styers, Forensic Consultant, March 30, 2006, Exhibit O to Petitioner's Objections to the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi, Filed in the District Court on April 5, 2006.

REASONS FOR GRANTING THE PETITION

I. The Federal Courts Below, In Direct And Serious Conflict With The Standards Set Forth In *Strickland v. Washington*, 466 U.S. 668 (1984), Applied An Erroneous, Sufficiency-Of-The-Evidence Standard When Evaluating The Prejudice Which Resulted From Trial Counsel's Ineffectiveness.

At issue in this habeas corpus proceeding, was whether Petitioner's trial counsel, by his ineffectiveness, so completely emasculated Petitioner's claim to have acted in self defense, that the reliability and fundamental fairness of the proceedings was destroyed – and whether Petitioner as a result was unconstitutionally convicted of premeditated murder and unjustly sentenced to spend his life in prison without possibility of parole. In support of this ineffectiveness claim, Petitioner raised, in the District Court, several related – and cumulatively very damaging – omissions by trial counsel:

> (1) that he failed to call Petitioner's brother to testify to the admissions made by Kevin Williams to having "finished" White off after he had first been shot by Petitioner, and to White's possession of a nine millimeter firearm at the time he made those admissions;
>
> (2) that he failed to object to the highly speculative expert testimony by Lieutenant Stephan, as he could have done under Pennsylvania law; and

> (3) that he failed to obtain and present an independent expert ballistics analysis for the defense.

In rejecting all three of these bases for the claim, the District Court effectively applied a sufficiency-of-the-evidence standard for judging prejudice, instead of the probabalistic analysis which has been required by this Court ever since its seminal decision in *Strickland v. Washington*, 466 U.S. 668 (1984).[5]

In *Strickland*, this Court described the standards applicable to the prejudice inquiry as follows:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

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5. The ineffectiveness issues were, of course, raised in the context of a habeas petition under 28 U.S.C. § 2254, and the District Court's holdings were therefore generated in the course of deciding whether or not the Pennsylvania Superior Court's rejection of the claim represents an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d)(2). Since the District Court failed to apply the proper standards for judging prejudice under *Strickland*, its analysis of the issue presented under § 2254(d) was likewise unsound. Similarly incorrect, therefore, also, was the Third Circuit's conclusion that Petitioner had "failed to make a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2). On the contrary, as set forth more fully in the text of Parts I and II herein, Petitioner has made out a very substantial case of attorney ineffectiveness and has demonstrated that the Superior Court's holding to the contrary constitutes an unreasonable application of the *Strickland* standards.

> A reasonable probability is a probability sufficient to undermine confidence in the outcome.

466 U.S. at 694.

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . .
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

466 U.S. at 695-696. Significantly, this Court in *Strickland* specifically considered *and rejected* the position advanced by the Florida respondents, which would have required defendants making ineffectiveness claims to shoulder the much higher burden of proving that counsel's deficient conduct "more likely than not" altered the outcome of the case. This Court, however, rejected that suggestion in favor of the "reasonably likely" standard.

The District Court in this case, however, went even further afield from the proper standard under *Strickland* – and effectively applied a sufficiency-of-the-evidence standard. Although the Court did recite the proper standard at certain points in its opinion – *see, e.g.*, Appendix, 12a, 16a – the Court went on to simply disregard that standard and to reject Petitioner's prejudice claims on grounds that the jury still *might have* or *could have* convicted Petitioner, even if counsel had supplied the omitted evidence and made the omitted objections. *See* Appendix 17a ("Even if Kurtis Rainey had been allowed to bolster the second gunman theory through his own testimony, the jury *might have* rejected his account based upon the conflicting testimony of Boyd" – emphasis supplied); 17a. ("the undisputed fact that Petitioner shot an unarmed man at least two times and the testimony of Dr. Mills that '[t]he cause of death was multiple gunshot wounds to the chest and the abdomen and the back," *could have* led the jury to conclude that Petitioner committed first degree murder' " – emphasis supplied); 22a ("we have already found that the Superior Court was not unreasonable in deciding that

even if Petitioner had conclusively established the existence of a second shooter, such evidence *might not have influenced* the outcome of the trial"– emphasis supplied).

Although this serious error was pointed out by Petitioner in his application for a certificate of appealability in the Third Circuit, that Court not only failed to correct the District Court's error, but in fact specifically adopted the District Court's reasoning. Appendix, 1a. In effect, therefore, the Third Circuit has sanctioned the application, to Petitioner's case, of a standard at odds with this Court's holding in *Strickland.*

Issuance of a writ of certiorari is appropriate and necessary for a number of reasons. First of all, of course, the Courts below have sanctioned the application of a much stricter standard to the prejudice prong of an ineffectiveness analysis, than the standard mandated by this Court. This failure to abide by *Strickland* clearly requires this Court's supervisory correction. Petitioner had the right to have his habeas petition decided in accordance with the standards set down by this Honorable Court, and not by any more difficult standard.

Secondly, the application of an incorrect standard by the federal courts below has continued the very palpable denial of justice that took place in the Pennsylvania court system. The physical evidence, under any rational analysis, demonstrated that two separate guns were most likely used in the assault against the victim. The injuries most likely to have actually caused

death – and the injuries that were consistent with firing at an already-subdued, prone victim – were caused by 9 millimeter gunshot wounds to the back, whereas the less damaging wounds were inflicted by a different caliber firearm from the victim's front. There was no evidence in the record whatsoever to indicate a conspiracy, or concerted action of any kind, between Petitioner and anyone else. All witnesses, *including the Commonwealth's*, agreed that it was the victim who relentlessly pursued Petitioner as he was attempting to walk away from the argument, that the victim was accompanied by at least one and maybe more friends, and that the victim had a reputation for being armed. Petitioner testified that he did indeed fire some shots, in the belief that they were required for his self-defense, from his .380 caliber weapon – and that he was horrified when subsequently, one of his "friends" proceeded to do him the non-favor of finishing off the victim while he lay prone upon the ground.

Had Kurtis Rainey's testimony been used, the jurors would have had before them Williams' confession to having fired the particular shots to the back which most clearly spelled first degree murder in this case. They would have had Officer Rainey's observation that Williams did in fact have a nine millimeter firearm. They would also have had a reason to reject the Commonwealth's suggestion that Mr. Williams was a non-existent phantom, recently fabricated by Petitioner for purposes of the trial. *See* Part II below.

Similarly, had the defense obtained a ballistics expert, the jurors would *at worst* have had before them the testimony of an expert other than Lt. Stephan,

pointing out the huge unlikelihood of the single gunman theory, as well as the deficiencies of his scientific methodology and the speculative nature of Lt. Stephan's testimony. At best, with the assistance of a countervailing defense expert report, counsel might have kept out Lt. Stephan's testimony entirely, *see* Part II below, thus depriving the Commonwealth of *any* underpinnings for its single-gunman theory, and leaving Petitioner's testimony about self defense (whether justifiable or mistaken belief, no matter) effectively unopposed, and also unambiguously corroborated by the physical evidence.

The Superior Court, the District Court, and ultimately the Third Circuit Court of Appeals, have all adopted a position that is simply not supportable in any way shape or form upon the record of the trial in this case – that is, that trial counsel's failure to challenge the single-gunman theory with available, countervailing *evidence*, as opposed to mere *argument*, was harmless. As will be further argued in Part II below, the Superior Court's original holding to this effect was predicated upon very obvious mis-statements of the record and should have entitled Petitioner to habeas relief under 28 U.S.C. §§ 2254(d)(2) and (e)(1).

What is important for the *instant* argument, however, is that District Court, with the Court of Appeals' imprimatur, repeatedly analyzed and rejected Petitioner's ineffectiveness claims because the outcome of the proceedings *could possibly* have remained the same, even if counsel had not committed the errors complained of – in other words, because there would still have been *sufficient* evidence to convict. Had the District

Court applied the correct *Strickland* analysis, however, the inquiry would have been very different: whether there is a *reasonable probability* that outcome of the proceeding would have been different.

Furthermore, the easy substitution of a sufficiency evaluation for the evaluation mandated by *Strickland* could potential affect thousands of litigants unless the error is promptly corrected. It is, therefore, a matter of gravest importance that this Honorable Court grant certiorari to address the false equivalency set up in the Courts below between the "reasonable probability" standard of *Strickland* on the one hand and the sufficiency of the evidence to convict on the other.

II. The Courts Below Abdicated Their Responsibility To Remedy The Superior Court Of Pennsylvania's Clearly Unreasonable Misapplication Of *Strickland v. Washington*, 466 U.S. 668 (1984) – As Well Its Clearly Erroneous Factual Determinations Which Were Directly Contrary To The Evidence Of Record – In A Case In Which Petitioner's Claim To Have Acted In Self Defense Was Totally Emasculated By Trial Counsel's Ineffectiveness.

The ineffectiveness issues mentioned above were, of course, raised in the context of a habeas petition under 28 U.S.C. § 2254, and the District Court's holdings were therefore generated in the course of deciding whether or not the Pennsylvania Superior Court's rejection of the claim represents an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d)(2). Since the District Court failed to apply the proper standards for judging prejudice under *Strickland*, its analysis of the issue

presented under § 2254(d) was likewise unsound. Similarly incorrect, therefore, also, was the Third Circuit's conclusion that Petitioner had "failed to make a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2).

As previously argued, the District Court evaluated the prejudice prong of the ineffectiveness analysis while using the wrong standard. It also deferred to state court adjudications that simply were not entitled to any deference. The Superior Court, for example, rationalized counsel's failure to use Officer Kurtis Rainey's testimony, based on counsel's testimony that (1) he could not locate Kevin Williams and thought that his admissions to Kurtis Rainey would be excludable on hearsay grounds, and (2) he thought "that the bias of Kurtis Rainey would be harmful to his brother Karl given the fact that they were brothers." Appendix, 48a-49a; N.T. 6/21/01, pp. 6-7. The first belief, however, was clearly wrong under established Pennsylvania law. *See Commonwealth v. Young*, 561 Pa. 34, 55, 748 A.2d 166, 176-177 (1999) (hearsay exception for admissions against penal interest); *Commonwealth v. Statum*, 769 A.2d 476, 479 (Pa.Super. 2001) (counsel ineffective for failing to present declaration against penal interest by person other than defendant). The second belief, moreover, was totally illogical given that *Petitioner* was allowed to testify to the very same facts – but was left without corroboration of any kind at all – a pattern not of strategic choice but neglect! Indeed, if counsel were free to disregard important evidence willy nilly merely because the witness had some bond of friendship or relationship by the defendant, one wonders how there could ever be proof of alibi defenses or character testimony – much less how state prosecutors

could manage to prove their cases which depend so often upon an informing "friend" or relation.

Furthermore, the evidence ignored by Petitioner's trial counsel was extremely important to establishing Petitioner's defense. *Compare, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973), in which this Court held that even a state's otherwise valid rule excluding hearsay could not, constitutionally, be invoked to prevent a defendant from putting on evidence of a third party's confession to having committed the offense for which Petitioner was charged.

The District Court, however – despite these gaping holes in the rationales advanced by counsel – deferred to the Superior Court's unreasonable reasoning without undertaking any evaluation whatsoever of the underlying analysis. Appendix, 15a-16a, n.2.

Similarly unreasonable was the Superior Court and District Court's reasoning regarding counsel's failure to object to – or provide countervailing expert testimony to – Lt. Stephan's highly conjectural single-gunman theory, which he advanced from no more scientific a basis than his own experience firing a single gun! N.T. 8/8/95, p. 104. There was, moreover, not one iota of evidence in the record to indicate that Petitioner's gun was of the same "cheap" California make as the gun Lt. Stephan had test-fired in this way. N.T. 8/8/95, p. 105. The admission of this testimony, therefore, definitely fell afoul of Pennsylvania's clearly stated evidentiary prohibition against the admission of expert testimony which is based upon "conjecture or guesswork." *See Commonwealth v. Petrovich*, 538 Pa. 369, 372, 648

A.2d 771, 774 (1994). Counsel, however, failed to lodge any objection whatsoever to the conjectural foundation of the expert's premise.

Similarly, a long line of Pennsylvania cases had by the time of Petitioner's trial held that prior to admitting expert testimony in a particular area of expertise, it was necessary first to determine "that the subject about which the expert would testify has been sufficiently established to have gained general acceptance in the particular field in which it belongs." *See, e.g., Commonwealth v. Dunkle*, 529 Pa. 168, 173, 602 A.2d 830, 832 (1992). Again, however, counsel failed to challenge Lt. Stephan's methodology of making sweeping generalizations based upon a single test fire, and his basis for concluding that the live 9 millimeter rounds were deformed because of being jammed, supposedly, into a .380 caliber firearm.

Additionally, counsel failed to take any steps to counteract Lt. Stephan's testimony, once it was received. As is apparent from Petitioner's offers of proof in the PCRA and District Courts, expert testimony would have been readily available and helpful both in cross examination and in the defense case in chief, had counsel bothered to seek it out. Indeed, had a defense expert report been offered in *advance* of trial, a compelling case could have been made for the exclusion of Lt. Stephan's testimony *in toto!*

The Superior Court, however, in its September 9, 2004 Memorandum, defers to counsel's testimony at the PCRA hearing that

> he believed the ballistics testimony carried no weight, and because no gun or guns were ever recovered, it was not possible to positively compare the bullets retrieved from the victims to any gun. In counsel's opinion, it was in Appellant's best interests not to challenge this testimony so as not to re-emphasize it to the jury, and instead he chose to address it in his closing argument where he could point out its lack of significance.

Appendix, p. 50a. Respectfully, Superior Court failed to reasonably apply *Strickland* when it rubber-stamped counsel's clearly irrational strategy. Nowhere does the Superior Court explain why allowing objectionable testimony in and then arguing against it in closing argument could *possibly* be preferred as a matter of defense strategy to not allowing the objectionable testimony in, in the first place. Nor does the Superior Court explain why it was rational for trial counsel to worry about *"re-emphasizing"* the single gunman theory when the Commonwealth had already indicated in its opening argument the prominence it was going to give to that theory. N.T. 8/7/95, pp. 30, 32. *See also*, extensive closing argument on the point at N.T. 8/9/95, pp. 106-107, 111-112, 116, 119-120. Accordingly, it was error for the District Court to have afforded any deference to the Superior Court's opinion, in the face of such unreasonable conclusions of fact on the record, and in the face of such an unreasonable application of

Strickland. A certificate of appealability should, therefore, have been granted to correct the error of the District Court.

The District Court's application of the prejudice prong of the *Strickland* analysis was similarly in error. In addition to applying the wrong standard under *Strickland*, the District Court concluded that Petitioner was not prejudiced by any of counsel's omissions, *based upon findings of fact which were wrong and unwarranted upon the record back when the Superior Court first advanced them, and which are just as wrong and unwarranted upon the record now in the instant habeas proceedings.*

With respect to the failure to call Kurtis Rainey, for example, the Superior Court stated that

> [i]n light of Appellant's admission at trial that he intended to shoot the victims, and the evidence that the cause of death was the result of multiple gunshot wounds and not any one isolated wound; the introduction of testimony by Appellant's brother which referenced a second gunman would not have exonerated Appellant.

Appendix, 48a-49a. This conclusion is echoed in the District Court's reference to the supposedly "undisputed fact that Petitioner shot an unarmed man at least two times and the testimony of Dr. Mills that 'the cause of death was multiple gunshot wounds to the chest and the abdomen and the back.' " Appendix, p. 17a.

Both factual premises in the Superior and District Court's opinions are inaccurate as stated. While Dr. Mills did testify in summary fashion that the cause of death was "multiple gunshot wounds" – her precise testimony as to each of the eight wounds suffered by White made it perfectly clear that the wound most likely to have caused White's death was the "eighth" wound – which was one of the wounds inflicted upon White with a nine millimeter gun while White was on the ground, already injured. In other words, Dr. Mills' testimony clearly supported the inference that was being advanced by *the defense*, which was, that Kevin Williams fired the fatal shot. Thus, whatever the jury *could have* concluded, the *probable* conclusion based on Dr. Mills' testimony and the locations of the various bullets found in the body, was that, just like Petitioner testified, somebody else with a nine millimeter gun was responsible for killing White. The only reason that probable result was aborted was the unchallenged and insupportable expert opinion of Lt. Stephan.

Nor is it an accurate statement, without qualification, that Petitioner "shot an unarmed man at least two times," or that he "intended to shoot the victim." The correct statement is that Petitioner admitted that he intended to shoot the victim *in self defense and in reasonable fear for his life*, given Mr. Boyd's and Mr. White's reputations for violence, carrying guns and shooting people, N.T. 8/9/95, pp. 25-29, 46-47, 52, given that he had been specifically warned to watch his back with White for that reason, N.T. 8/9/95, p. 52, given the fact that White was *pursuing* Petitioner and continuing the difficulty while Petitioner in fact was attempting to walk away, N.T. 8/7/85, pp. 90-94, 114-115 (Boyd); 8/8/95, pp. 7-10, 18 (White);

8/9/95, pp. 335-39, 45-56 (Stanton), 55-59 (Petitioner), and given the fact that Petitioner was being restrained from leaving by White and his associates, who had surrounded him. N.T. 8/8/95, pp. 17-19; 8/9/95, pp. 38-39, 45-46. Petitioner's claim that he believed himself in danger, and that White appeared to be reaching for a gun, was, furthermore, *not* especially disproved even by Boyd himself, who was unable to see what if anything White was doing with his hands, that might have alarmed Petitioner. N.T. 8/7/95, p. 125. Accordingly, there was significant corroboration of Petitioner's statement that he intended to *defend himself* and fired shots at White for that purpose alone.

In light of all the above, and given the previously described weaknesses in the eyewitness testimony from Boyd and Kevin White, it was objectively unreasonable for the District Court and the Superior Court to conclude *on this record* that Lt. Stephan's testimony was insignificant, and that it would not have dramatically aided the defense to point out the unlikelihood of the single-gunman theory, the glaring omissions in Lt. Stephan's science and methodology – as well as the existence of a witness to Kevin Williams' confession, the caliber of the guns carried by Williams and Petitioner, and the fact that Petitioner had been claiming self-defense ever since the very morning of the shooting.

In sum, the Superior Court's objectively unreasonable factual determinations have led to an objectively unreasonable application of *Strickland* on this record. The District Court erred in not so holding, and the Court of Appeals erred in not issuing a certificate of appealability.

CONCLUSION

For all of the foregoing reasons, therefore, Petitioner respectfully requests that this Court grant a writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 18, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 06-4347

(E.D. Pa. Civ. No. 05-cv-01334)

KARL RAINEY,

Appellant

v.

DAVID DIGUGLIELMO, et al.,

Present: SLOVITER, CHAGARES AND GREENBERG, CIRCUIT JUDGES

ORDER

The foregoing motion by Appellant for an enlargement of the page limitation for an application for certificate of appealability is granted. Appellant's application for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). For essentially the reasons discussed by the District Court, jurists of reason would not debate the correctness of the District Court's decision to deny Appellant's petition filed pursuant to 28 U.S.C. § 2254. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Appellant has failed to make a substantial

showing of the denial of a constitutional right, and a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003).

By the Court,

/s/ Morton I. Greenberg
Circuit Judge

Dated: May 18, 2007

APPENDIX B MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED SEPTEMBER 7, 2006

IN THE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 05-1334

KARL RAINEY

v.

DAVID DIGUGLIELMO, et al.

MEMORANDUM

Presently before the Court is Karl Rainey's counseled Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. On January 12, 2006, Magistrate Judge Peter B. Scuderi filed a Report and Recommendation ("R & R") recommending that we deny the Petition in its entirety. On April 5, 2006, Petitioner filed timely Objections to the R & R. For the reasons that follow, we overrule Petitioner's Objections, adopt the R & R as amplified by this Memorandum, and deny the Petition in its entirety.

Appendix B

I. BACKGROUND

On August 10, 1995, following a jury trial before the Honorable Paul Ribner of the Philadelphia County Court of Common Pleas, Petitioner was found guilty of the first degree murder of Kenneth White, aggravated assault upon Ervin Boyd, and carrying a firearm on the public street. The Pennsylvania Superior Court ("Superior Court") set forth the relevant facts as follows:

> [Petitioner] and the Decedent Kenneth White had several verbal confrontations prior to the night of the murder. On the night in question, [Petitioner] was leaving a bar when Decedent and his friend Ervin Boyd were entering the bar. [Petitioner] and Decedent began to argue as [Petitioner] walked to his car. Boyd followed along. Upon arriving at his car, [Petitioner] pulled a gun from his jacket and shot Decedent several times. [Petitioner] then shot Boyd who hid behind a parked car. [Petitioner] cleared a j am in his gun, returned to Decedent's body and fired three more shots into Decedent's back. Then, [Petitioner] found Boyd and shot him three more times. As [Petitioner] fled from the scene, he ran over Boyd and dragged him one block from the scene. Boyd survived and Decedent bled to death. No weapon was found on or near Decedent's body.[1]

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1. The state court's factual findings are accepted as correct, absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e). Petitioner argues that the Commonwealth's own

(Cont'd)

Appendix B

Commonwealth v. Rainey, 698 A.2d 110 (Pa.Super.Ct.1997) (table); No. 4275 PHL 1995, slip op. at 2-3 (Pa.Super.Ct. Jan. 16, 1997).

Petitioner was sentenced to life imprisonment for the murder and received concurrent sentences of 5-10 years on the assault charge and 1-2 years on the firearms violation. Petitioner appealed to the Superior Court, which affirmed his judgment of conviction on January 16, 1997. *Id.* at 4. Petitioner sought discretionary review by the Pennsylvania Supreme Court, but the Supreme Court denied allowance of appeal on November 3, 1997. *Commonwealth v. Rainey*, 704 A.2d 637 (Pa.1997) (table).

On October 30, 1998, Petitioner filed a *pro se* petition for state collateral review pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Con. Stat. Ann. § 9541. The PCRA court appointed counsel who, on June 8, 2000, filed an amended PCRA petition. The amended petition contended that Petitioner received ineffective assistance of counsel because, among other reasons: (1) trial counsel failed to call Petitioner's brother, Kurtis Rainey, as a witness; (2) trial counsel failed to object to the testimony of the Commonwealth's ballistics expert and failed to obtain a defense ballistics

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(Cont'd)
evidence at trial was that the Petitioner and the Decedent had only one confrontation prior to the night of the shooting, and that Petitioner attempted to peaceably leave the bar and proceed to his car, whereas the Decedent persisted in following Petitioner and haranguing him in a threatening manner. Such factual distinctions are not material to this Memorandum.

expert; and (3) appellate counsel failed to raise the issue of jury recantation. *Commonwealth v. Rainey*, No. 0710, slip op. at 2 (Phila.Ct.Com.Pl. Nov. 17, 2003). On June 4, 2002, after a hearing, the PCRA court dismissed the amended petition as being without merit. *Id.* Petitioner appealed to the Superior Court, asserting his ineffective assistance of counsel claims and contending as well that the PCRA court improperly denied his request to retain the state-funded services of an independent expert ballistics examiner. *Commonwealth v. Rainey*, 863 A.2d 1229 (Pa.Super.Ct.2004) (table); No. 2861 EDA 2002, slip op. at 2 (Pa. Super Ct. Sept. 9, 2004). On September 9, 2004, the Superior Court affirmed the PCRA court's decision, *id.*, and on February 22, 2005, the Pennsylvania Supreme Court denied Petitioner's request for allowance of appeal. *Commonwealth v. Rainey*, 868 A.2d 1199 (Pa.2005) (table).

On March 25, 2005, Petitioner filed the instant Petition for Writ of Habeas Corpus, raising the claims that Petitioner had previously asserted before the PCRA court and before the Superior Court on appeal. The Magistrate Judge issued a Report and Recommendation ("R & R") advising that the Petition be denied in its entirety because it fails on the merits. Petitioner's Objections to the R & R present no new issues or arguments; Petitioner primarily contends that the Magistrate Judge failed to appreciate the extent to which evidence that there was a second gunman could have exonerated Petitioner and, as a consequence, incorrectly analyzed the claims presented in the instant Habeas Petition.

Appendix B

II. STANDARD OF REVIEW

Where a habeas petition has been referred to a magistrate judge for an R & R, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.... [The court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b).

The instant Petition was filed pursuant to 28 U.S.C. § 2254, which allows federal courts to grant habeas corpus relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Since it was filed after April 24, 1996, this Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214; *see Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Section 2254(d)(1), as amended by the AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

> established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1). Under the AEDPA, a state court's legal determinations may only be tested against "clearly established Federal law, as determined by the Supreme Court of the United States ." *See* 28 U.S.C.A. § 2254(d)(1). This phrase refers to the "holdings, as opposed to the dicta" of the United States Supreme Court's decisions as of the time of the relevant state court decision. *Williams v. Taylor,* 529 U.S. 362, 412 (2000).

To apply the AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts initially must determine whether the state court decision regarding each claim was contrary to clearly established Supreme Court precedent. *Werts v. Vaughn,* 228 F.3d 178, 197 (3d Cir.2000). A state court decision may be contrary to clearly established federal law as determined by the United States Supreme Court in two ways. *See Williams,* 529 U.S. at 405. First, a state court decision is contrary to Supreme Court precedent where the court applies a rule that contradicts the governing law set forth in United States Supreme Court cases. *Id.* Alternatively, a state court decision is contrary to

Supreme Court precedent where the state court confronts a case with facts that are materially indistinguishable from a relevant United States Supreme Court precedent and arrives at an opposite result. *Id.* at 406. If relevant United States Supreme Court precedent requires an outcome contrary to that reached by the state court, the federal habeas court may grant relief at this juncture. *Matteo v. Superintendent S.C.I. Albion*, 171 F.3d 877, 890 (3d Cir.1999).

If the state court decision is not contrary to precedent, the court must evaluate whether the state court decision was based on an unreasonable application of Supreme Court precedent. *Id.* A state court decision can involve an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case. *Williams*, 529 U.S. at 407. To grant a writ of habeas corpus under the unreasonable application prong, the federal court must determine that the state court's application of clearly established federal law was objectively unreasonable. *Id.* at 409; *Werts*, 228 F.3d at 197. A federal court cannot grant a writ of habeas corpus simply by concluding in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; mere disagreement with a state court's conclusions is insufficient to justify relief. *Williams*, 529 U.S. at 411; *Matteo*, 171 F.3d at 891. In determining whether the state court's application of the Supreme Court precedent is objectively unreasonable, habeas courts may consider the decisions of inferior federal courts. *Matteo*, 171 F.3d at 890.

Section 2254 further mandates heightened deference to state court factual determinations by imposing a presumption of correctness. 28 U.S.C.A. § 2254(e)(1). The presumption of correctness is rebuttable only through clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that is "so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *United States Fire Ins. Co. v. Royal Ins. Co.*, 759 F.2d 306, 309 (3d Cir.1985).

III. DISCUSSION

A. *Ineffective Assistance of Counsel*

Petitioner accepts the standard of review the Superior Court identified as governing ineffective assistance of counsel claims but argues that the Superior Court unreasonably applied it to the facts of his case. The Superior Court used the following standard in analyzing Petitioner's claims of ineffective assistance of counsel in his PCRA petition:

> [t]o prevail on a claim that counsel was constitutionally ineffective, the [Petitioner] must overcome the presumption of competence by showing that: (1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate [Petitioner's] interests; and (3) but for counsel's ineffectiveness, there

> is a reasonable probability that the outcome of the challenged proceeding would have been different. A failure to satisfy any one prong of the test for ineffectiveness will require rejection of the claim.

Commonwealth v. Rainey, No. 2861 EDA 2002, slip op. at 3 (citing *Commonwealth v. Wharton*, 811 A.2d 978 (Pa.2002)). The Pennsylvania Supreme Court has determined that this standard is the same as that set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Young v. Vaughn*, Civ. A. No. 00-3512, 2002 U.S. Dist. LEXIS 4094, at * 18 (Mar. 6, 2002) (citing *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa.1987)). The United States Court of Appeals for the Third Circuit has also examined this standard and has determined that its application does not contradict the Supreme Court's holding in *Strickland* and, therefore, is not contrary to established Supreme Court precedent. *Werts*, 228 F.3d at 204.

In *Strickland*, the Supreme Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, 466 U.S. at 687, and set forth a two-prong test for determining ineffective assistance of counsel. A defendant first must show that counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. "In evaluating counsel's

performance, [the court is] 'highly deferential' and 'indulge[s] a strong presumption' that, under the circumstances, counsel's challenged actions 'might be considered sound . . . strategy.' " *Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir.1999) (quoting *Strickland*, 466 U.S. at 689). "Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, [ ] it is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.' " *Id.* (citing *United States v. Gray*, 878 F.2d 702, 711 (3d Cir.1989)).

If a defendant shows that counsel's performance was deficient, he then must show that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.*

Appendix B

1. *Failure to present the testimony of Kurtis Rainey*

In his first objection, Petitioner contends that his trial counsel's failure to present his brother Kurtis Rainey's testimony constitutes ineffective assistance under any reasonable application of Supreme Court precedent. Petitioner maintains that his brother's testimony would have significantly supported his contention at trial that he acted in self defense in the death of Kenneth White. Indeed, Petitioner does not dispute that he fired at least two shots from a. 380 caliber pistol at White, but he insists that he fired the shots only upon the legitimate belief that White was reaching inside his coat for a gun. (8/9/95 N.T. at 52-58, 95, 97-99.) At Petitioner's trial, the medical examiner, Dr. Stephanie Mills, testified that the Decedent suffered eight gunshot wounds to the chest, the abdomen, and the back. (8/8/95 N.T. at 113, 127.) The Decedent's wounds were created by both .380 caliber and 9 millimeter caliber bullets. (8/8/95 N.T. at 83-84.) The Commonwealth put on evidence by a ballistics experts, Lieutenant Mark Stephan, who testified that 9 millimeter ammunition can be fired from a .380 caliber firearm. (8/8/95 N.T. at 88-89, 103.) The Commonwealth relied on that testimony to argue at trial that all of the shots to the Decedent originated with the Petitioner. (8/9/95 N.T. at 111-12, 119-120.) The Commonwealth further asserted that, since the Decedent was shot through the back, Petitioner could not possibly have been acting in self defense. (8/9/95 N.T. at 106-07, 113-16, 119-120.) Petitioner, in contrast, testified at trial that, although he was responsible for

frontal wounds to the Decedent, having shot the Decedent in fear for his life, he was not responsible for the additional wounds to the Decedent's back. (8/9/95 N.T. 58-61, 100-02). Petitioner maintained that there was a second gunman-his friend, Kevin Williams-who was present at the scene, armed with a 9 millimeter pistol, and who, without Petitioner's consent or prior agreement, fired the final, ultimately fatal, shots into the Decedent's back while the Decedent was already disabled. (8/9/95 N.T. at 58-61, 78-79, 100-102.) Petitioner argues that such a scenario militates in favor of self-defense and that corroborating testimony from his brother was critical to its believability.

Petitioner attached an affidavit from his brother to his PCRA petition, and Kurtis Rainey testified at Petitioner's PCRA hearing. At the time of the hearing, Kurtis Rainey was an officer with the West Whiteland Township, Pennsylvania police department. (6/21/2001 N.T. at 31, 34.) In his affidavit and hearing testimony, Kurtis Rainey stated that on the day of the shooting, Petitioner and Williams visited him and related a version of what had happened that was consistent with Petitioner's trial testimony. (Kurtis Rainey Aff. ¶ 3; 6/21/2001 N.T. at 32.) In the process of describing the events of the early morning, Williams told Kurtis Rainey that "the motherfucker tried to get your brother. . . . Your brother shot them and then I finished it." (Kurtis Rainey Aff. ¶ 4; 6/21/2001 N.T. at 32.) Kurtis Rainey observed that Williams was carrying a silver-plated 9 millimeter pistol. (Kurtis Rainey Aff. ¶ 4; 6/21/2001 N.T. at 33.) Kurtis Rainey informed Petitioner's trial counsel of these

facts, indicated a willingness to testify on Petitioner's behalf, and was present and available at trial. (Kurtis Rainey Aff. ¶¶ 6-7; 6/21/2001 N.T. at 33.)

On post-conviction review, the Superior Court found under the equivalent of *Strickland's* prejudice prong that Petitioner's trial counsel was not ineffective for failing to present Kurtis Rainey's testimony. The Superior Court wrote that

> [i]n light of [Petitioner's] admission at trial that he intended to shoot the victims, and the evidence that the cause of death was the result of multiple gunshot wounds and not any one isolated wound, the introduction of testimony by [Petitioner's] brother which referenced a second gunman would not have exonerated [Petitioner]. As such, [Petitioner's] accusation of ineffective assistance of counsel fails because the underlying argument is without merit."[2]

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2. The Superior Court also noted that, at Petitioner's PCRA hearing, his trial counsel testified that he met and discussed with Kurtis Rainey the alleged confession by Williams and that he investigated it extensively, interviewing a "number of other witnesses prior to trial to in connection with determining that alleged confession, its existence, non-existence, validity." (9/21/01 N.T. at 6.) Upon failing to locate Williams or to find anyone who could verify the alleged confession, trial counsel elected not to present the testimony fearing that "the bias of Kurtis Rainey would be harmful to his brother Karl given the fact that they were brothers." (9/21/01 N.T. at 7.) The Superior Court wrote (Cont'd)

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Commonwealth v. Rainey, No. 2861 EDA 2002, slip op. at 5.

Petitioner argues that this conclusion is unreasonable based on the evidence at trial. Petitioner maintains that his brother's testimony would have confirmed that he had not fabricated the existence of a second gunman with a 9 millimeter handgun, and that he did not have the intent to kill associated with shooting an incapacitated man through the back. Petitioner contends that he had a credible claim of self-defense, based in part on the reputations of White and Boyd for carrying guns and shooting people (8/9/95 N.T. at 46-47, 51-53), and it was essential to that defense to introduce all available evidence that it was Williams who, in the heat of the moment or for reasons of his own, decided to execute White.

We agree with the Magistrate Judge that the Superior Court's application of the federal law set forth in *Strickland* was not objectively unreasonable; Petitioner cannot demonstrate the requisite probability that the outcome of his proceeding would have been different if the jury had heard his brother's testimony regarding the existence a second shooter. "In considering whether a petitioner suffered prejudice, the effect of counsel's inadequate performance must be evaluated in

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(Cont'd)

that "it is well established that ineffective assistance of counsel will not be found where there is a reasonable basis for counsel's decision based on a matter of trial strategy." *Commonwealth v. Rainey,* No. 2861 EDA 2002, slip op. at 5.

light of the totality of the evidence at trial: a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Rolan v. Vaughn,* 445 F.3d 671, 681-82 (3d Cir.2006) (quotation omitted). Petitioner testified that he saw Williams stand over White and shoot him, and his lawyer argued the existence of a second gunman in his closing statements. (8/9/95 N.T. at 58-61, 100-102.) Even if Kurtis Rainey had been allowed to bolster the second gunman theory through his own testimony, the jury might have rejected his account based upon the conflicting testimony of Boyd. Boyd stated at trial that, although he admittedly did not see the face of the person who shot White in the back, from what heard while lying injured underneath a car, he believed Petitioner was responsible. (8/7/95 N.T. at 96-99, 122-124.) In addition, the Commonwealth called as a witness Kevin White, a disc jockey on the scene of no relation to the Decedent, who testified that the same person, identifiable by his quarter-length black leather jacket, fired all of the shots to White. (8/8/95 N.T. at 21-25.) Even if the jury had believed that there had been a second shooter, the undisputed fact that Petitioner shot an unarmed man at least two times and the testimony of Dr. Mills that "[t]he cause of death was multiple gunshot wounds to the chest and the abdomen and the back," could have led the jury to conclude that Petitioner committed first degree murder. (8/8/95 N.T. at 73, 127.) Accordingly, we find that the Superior Court's decision to affirm that trial counsel was not ineffective for failing to introduce testimony from Petitioner's brother was not contrary to Supreme Court precedent.

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2. *Failure to object to and present independent ballistics evidence*

Petitioner asserts that his trial counsel was ineffective for failing to object to the testimony of the Commonwealth's ballistics expert, Lieutenant Stephan, that both the .380 caliber and the 9 millimeter bullets that penetrated the Decedent's chest, abdomen, and back could have been fired from the same .380 caliber firearm. (8/8/95 N.T. at 88-89.) Petitioner asserts that this evidence was highly conjectural given that its scientific basis was that the expert had fired 9 millimeter bullets from a. 380 caliber firearm on a single occasion and that two live 9 millimeter rounds found on the street in the vicinity of the shooting had deformities that might have been indicative of a feed problem. (8/8/95 N.T. at 89-94, 104-05.) Petitioner contends that his trial counsel should have challenged Lieutenant Stephan's testimony as inadmissible on the ground that it ran afoul of Pennsylvania's evidentiary prohibition against the admission of expert testimony based on "conjecture or guesswork." *See Commonwealth v. Britcher,* 563 A.2d 502, 508 (Pa.Super.Ct.1989).

Petitioner also contends that his trial counsel was ineffective for failing to undermine the Commonwealth's single gunman theory by presenting countervailing expert testimony. Petitioner has submitted a detailed report from Gerald Styers, a forensic consultant, which indicates that the firing of 9 millimeter ammunition from a. 380 caliber weapon is highly unlikely, and that if such a firing had taken place at the crime scene, there should

have also been distortions on the fired cartridge cases, something Lieutenant Stephan never addressed. (Pet.Obj.Ex.O.) The report additionally explains that numerous factors may have caused the deformities on the live ammunition observed by Lieutenant Stephan, including dirt in the firearm. (*Id.*) Petitioner asserts that such independent expert information could have been used effectively in cross examination, could have been the subject of affirmative defense testimony, and might even have been used in limine to support the exclusion of Lieutenant Stephan's testimony. According to Petitioner, the Commonwealth was only able to argue with any authority that Petitioner was the only shooter because of trial counsel's failures.

The Superior Court held, with respect to trial counsel's handling of the ballistics evidence, that there was no reason to disturb the PCRA court's ruling that "trial counsel had a reasonable basis designed to effectuate [Petitioner's] interests under the given circumstances," and therefore, that trial counsel's performance was not outside the range of reasonable professional judgment. *Commonwealth v. Rainey,* No. 2861 EDA 2002, slip op. at 7. The Superior Court relied upon trial counsel's testimony at Petitioner's PCRA hearing. Trial counsel testified, regarding his failure to make objections, as follows:

> "[Lieutenant Stephan's] testimony was basically I wouldn't say worthless but it had no weight to it given the fact that he conceded it could have been fired from the same firearm

> or could have been fired from two or not, he didn't know. So as a practical matter I don't know if his testimony really carried much weight. . . . When he testified and made it plain that he could not say one way or another whether [the bullets] were fired from one [1] gun or two [2] guns or more than two [2] guns, as a practical matter objecting to it really would not have served the purpose for a couple of reasons. Number one is that the jury already heard it. Two, I didn't want to emphasize it for the jury. And three is if I could save it for argument and say, listen, he wasn't able to say definitively one way or the other, his testimony has no weight and no significance.

(6/21/01 N.T. at 17, 20.) Regarding his failure to hire an independent ballistics expert, trial counsel said that he did not need an expert to refute what he thought was simply the inference that the cartridges might have been fired from the same gun. (6/21/01 N.T. at 8.) He added that, because no guns had been recovered (Petitioner threw his weapon into the Schuylkill River), he knew that it was impossible for any ballistics expert to connect the bullets recovered from the crime scene to a specific firearm. (6/21/01 N.T. at 17, 20.) Based upon trial counsel's testimony, we conclude that the Superior Court was not objectively unreasonable in finding that the PCRA court correctly decided that counsel's ballistics-related decisions were strategically defensible. *See Rolan v. Vaughn*, 445 F.3d 671, 681-82 (3d Cir.2006)

("*Strickland* and its progeny make clear that counsel's strategic choices will not be second-guessed by post hoc determinations that a different trial strategy would have fared better." (internal citations omitted)).

Moreover, with respect to trial counsel's failure to obtain a ballistics expert for the defense, we agree with the Magistrate Judge that Petitioner has not established that there is a reasonable probability that the results of his trial would have been different if a defense expert had been made available. The testimony of the defense expert could have indicated that it was more, rather than less, likely that the bullets collected from the crime scene were produced from two separate firearms, but Lieutenant Stephan also allowed for the possibility of two gunmen in his testimony. (8/8/95 N.T. 94-95, 99 ("I am not certain-scientifically certain, . . . that [the fired cartridge cases] came from the same firearm. So I am saying, it is my opinion that it's possible that they did, but I can't be sure.").) Trial counsel emphasized on cross examination that Lieutenant Stephan believed that there could have been two gunmen:

> Q. But you are not excluding the possibility that they [the fired cartridge cases] could have come from two firearms; is that correct?
>
> A. No, I can't. Not scientifically, no.
>
> Q. You can't exclude the possibility that the .380s came from a .380 or a 9 millimeter came from a 9 millimeter, can you?

A. Correct.

(8/8/95 N.T. at 106.) In addition, we have already found that the Superior Court was not unreasonable in deciding that even if Petitioner had conclusively established the existence of a second shooter, such evidence might not have influenced the outcome of the trial. Accordingly, we conclude that the Superior Court's decision, to affirm that trial counsel's failure to object to the testimony of the Commonwealth's ballistics expert and failure to produce a defense ballistics expert was not ineffective assistance, did not reflect an unreasonable application of Supreme Court precedent.

3. *Failure to raise issue of juror recantation of appeal*

Petitioner maintains that his appellate counsel was ineffective for failing to raise the issue of juror recantation on direct appeal. The relevant facts, as set forth by the Superior Court, are as follows:

> the jury submitted its verdict in open court; the jury was polled upon the request of [Petitioner] whereby all members concurred; the verdict was recorded; the jury acknowledged in the affirmative the verdict as recorded; and the jury was discharged to reconvene the following day for sentencing. The following day, prior to the sentencing hearing beginning, one juror recanted his verdict on his own volition.

Commonwealth v. Rainey, No. 2861 EDA 2002, slip op. at 8. The Superior Court found that appellate counsel's failure to argue juror recantation did not fall outside the range of reasonable professional assistance because the underlying issue was without merit, and it thereby denied this claim of counsel ineffectiveness under the equivalent of *Strickland's* performance prong. *Id.* at 9.

It is well-settled that an attorney cannot be found ineffective for failing to raise a meritless claim. *See Strickland,* 466 U.S. at 691 (1984); *United States v. Sanders,* 165 F.3d 248, 253 (3rd Cir.1999). Petitioner contends that his claim is not meritless because, while the rule in Pennsylvania is that "after a verdict is recorded, and after the jury has been separated and discharged, jurors may not invalidate or impeach a verdict by their testimony," *Commonwealth v. Patrick,* 206 A.2d 295, 297 (1965), his jury was not discharged at the time of the impeachment, as it had yet to convene for sentencing. The Superior Court addressed this contention directly and concluded that "even though the same members of the jury were to reconvene for sentencing the following day, they were effectively discharged from the guilt phase of the trial. The law is clear, that after a jury verdict is duly recorded and the jury has been discharged, individual jurors may not invalidate or impeach their verdict by their own testimony without claiming outside influence." *Commonwealth v. Rainey,* No. 2861 EDA 2002, slip op. at 9 (citing *Patrick,* 206 A.2d at 295; *Commonwealth v. Spencer,* 393 A.2d 895 (Pa.Super.Ct.1978); *Commonwealth v. Stark,* 526 A.2d

383 (Pa.Super.Ct.1987)). The Third Circuit instructs that " 'it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. . . .' " *Warren v. Kyler*, 422 F.3d 132, 136 (3d Cir.2005) (quoting *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)); *cf. Williams v. Price*, 343 F.3d 223, 235 (3d Cir.2003) (noting that enforcement of Pennsylvania's "no impeachment rule" is a matter for Pennsylvania courts). Accordingly, we assume that the Superior Court's interpretation of Commonwealth law governing juror recantation is correct. We conclude, therefore, that appellate counsel was not ineffective for failing to raise juror recantation when the juror in question was not permitted to impeach his own verdict. We further conclude that the Superior Court did not unreasonably apply Supreme Court precedent in affirming the PCRA court's decision in this regard.

B. *PCRA Court Error*

Petitioner argues that the PCRA court violated his due process and equal protection rights when it denied his request for a ballistics expert at state expense. Petitioner argues that he was entitled to an expert under the Supreme Court precedent established by *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* addressed the rights of indigent criminal defendants, whose sanity is in issue, to state-sponsored psychiatric assistance in preparing their defenses. The Supreme Court identified three factors to be used in determining whether the state must fund access to such expertise:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation if those safeguards are not provided.

Id. at 77. The Superior Court upheld the PCRA court's decision not to provide Petitioner with a state-sponsored ballistics expert based on its finding that Petitioner offered "no reasonable support as to how a ballistics expert would further [his] argument regarding a second gunman." *Commonwealth v. Rainey,* No. 2861 EDA 2002, slip op. at 7. Petitioner contends that the Superior Court's conclusion is unreasonable. Petitioner asserts that the Commonwealth's use of its own ballistics expert at trial demonstrates that the issue of whether there were one or two gunmen was clearly important and that it was nonsensical for the Superior Court to conclude that countervailing expert testimony would not have contributed to Petitioner's ability to rebut the one gunman theory.

We assume—for argument purposes only-that Ake is applicable outside the context of a psychiatric defense at the trial court level. *See Caldwell v. Mississippi,* 472 U.S. 320, 323 n. 1 (1985) (stating that *Ake* did not require the appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, where the defendant

offered "little more than undeveloped assertions that the requested assistance would be beneficial," and refusing to reach the question of "what if any showing would have entitled a defendant to assistance of the type here sought"). Although the Superior Court did not explicitly rely on *Ake*, its rationale for denying Petitioner's request coincides with *Ake's* third prong, and we will, therefore, give its decision deference. *See Matteo*, 171 F.3d at 890. Petitioner acknowledges that on collateral review he was able to represent to the PCRA court how he thought an independent ballistics expert would have helped his defense. For example, Petitioner provided the PCRA court with an offer of proof from a forensic consultant stating that determination of whether the .380 and 9 millimeter caliber cartridges were fired from the same firearm required microscopic examination. (Pet.Obj.Ex.L.) Petitioner also submitted an offer of proof from the manufacturer of his .380 pistol, which stated that only early models could be forced to function with 9 millimeter ammunition. (Pet.Obj.Ex.M.) We find that, with respect to Petitioner's claims on collateral review, a full-length independent report by a state-funded ballistics expert would have added little probative value. Accordingly, we decide that the Superior Court was not in error in affirming the PCRA court's decision to deny Petitioner the appointment of a ballistics expert.

IV. CONCLUSION

For the foregoing reasons, we conclude that the instant Petition is without merit. Accordingly, the Petition is denied. Moreover, as Petitioner has failed to

make a substantial showing of the denial of a constitutional right, the Court further concludes that there is no basis for the issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). An appropriate order follows.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 05-1334

KARL RAINEY

v.

DAVID DIGUGLIELMO, et al.

ORDER

AND NOW, this 6th day of September, 2006, upon careful and independent consideration of the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and all attendant and responsive briefing, after review of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi, and in consideration of Petitioner's Objections to the Report and Recommendation and all submissions filed in response thereto, **IT IS HEREBY ORDERED THAT:**

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED;**

2. The Report and Recommendation is **APPROVED** and **ADOPTED** to the extent that it is not inconsistent with the accompanying Memorandum;

3. The Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED;**

4. A certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) is **DENIED;** and

5. The Clerk shall **CLOSE** this case statistically.

BY THE COURT:
s/ John R. Padova
John R. Padova, J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JANUARY 12, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 05-1334

KARL RAINEY

v.

DAVID DIGUGLIELMO, et al.

REPORT AND RECOMMENDATION

This is a counseled petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Karl Rainey ("Petitioner"), an individual currently incarcerated in the Graterford State Correctional Institution. For the reasons that follow, I recommend that the petition be denied.

FACTS AND PROCEDURAL HISTORY:

The relevant facts, set forth by the Pennsylvania Superior Court, are as follows:

> [Petitioner] and the Decedent Kenneth White had several verbal confrontations prior to the

> night of the murder. On the night in question, [Petitioner] was leaving a bar when Decedent and his friend Ervin Boyd were entering the bar. [Petitioner] and Decedent began to argue as [Petitioner] walked to his car. Boyd followed along. Upon arriving at his car, [Petitioner] pulled a gun from his jacket and shot Decedent several times. [Petitioner] then shot Boyd who hid behind a parked car. [Petitioner] cleared a jam in his gun, returned to Decedent's body and fired three [3] more shots into Decedent's back. Then, [Petitioner] found Boyd and shot him three [3] more times. As [Petitioner] fled from the scene, he ran over Boyd and dragged him one [1] block from the scene. Boyd survived and Decedent bled to death. No weapon was found on or near Decedent's body.

Commonwealth v. Rainey, 698 A.2d 110 (Pa.Super.1997) (table); No. 4275 PHL 1995, at 2-3 (Pa.Super.Jan.16, 1997) (unpublished memorandum), attached to Resp't Answer as Ex. "A."

On August 10, 1995, a jury sitting before the Honorable Paul Ribner, Court of Common Pleas of Philadelphia County, found Petitioner guilty of first degree murder, aggravated assault, and possession of an instrument of crime. The jury reached a verdict of life imprisonment for the murder conviction. The court sentenced Petitioner to concurrent terms of five (5) to ten (10) years of imprisonment for the assault charge and six (6) to twelve (12) months of imprisonment for the weapons charge.

Appendix C

Petitioner filed a direct appeal in the Pennsylvania Superior Court claiming:

> (1) there was insufficient evidence to prove first degree murder, specifically that the Commonwealth failed to prove beyond a reasonable doubt that he did not act in self defense; and
>
> (2) the verdict was against the weight of the evidence.

On January 16, 1997, the Superior Court affirmed the judgment of sentence. *Commonwealth v. Rainey, supra.* The Pennsylvania Supreme Court denied allocatur on November 3, 1997. *Commonwealth v.. Rainey,* 704 A.2d 637 (Pa.1997) (table).

On October 30, 1998, Petitioner sought relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Con. Stat. § 9541, *et seq.* Counsel was appointed to file an amended PCRA petition. An evidentiary hearing was held on June 21, 2001, before the Honorable William J. Mazzola, Court of Common Pleas of Philadelphia County. On June 4, 2002, Judge Mazzola dismissed Petitioner's PCRA petition, *Commonwealth v. Rainey,* No. 0710 (Phila.Ct.Com.Pl. Nov. 17, 2003) attached to Resp't Answer as Ex. "B."

Appendix C

Petitioner filed an appeal in the Pennsylvania Superior Court claiming:

> (1) ineffective assistance of trial counsel for failing to:
>
> > (a) present the testimony of Kurtis Rainey;
> >
> > (b) obtain a ballistics expert for the defense;
> >
> > (c) object to the testimony of the Commonwealth's ballistics expert;
>
> (2) ineffective assistance of appellate counsel for failing to raise on appeal his motion for mistrial after one juror recanted his verdict after the verdict had been recorded, but before the jury was discharged; and
>
> (3) PCRA court error for dismissing Petitioner's PCRA petition without appointing a ballistics expert to render a report.

The Superior Court affirmed the denial of PCRA relief on September 8, 2004. *Commonwealth v. Rainey,* No. 2861 EDA 2002 (Pa.Super.Sept.8, 2004) (unpublished memorandum). On February 22, 2005, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. *Commonwealth v. Rainey,* 499 E.D. Allocatur Docket 2004.

Appendix C

On March 23, 2005, Petitioner filed the instant petition for writ of habeas corpus advancing the claims he presented on collateral appeal. Respondents have filed an answer arguing that Petitioner is not entitled to habeas corpus relief because his claims are meritless.

DISCUSSION

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996, amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254. *Werts v. Vaughn*, 228 F.3d 178, 195 (3d Cir.2000). The AEDPA increases the deference federal courts must give to the factual findings and legal determinations of the state courts. *Werts* at 196 (citing *Dickerson v. Vaughn*, 90 F.3d 87, 90 (3d Cir.1996)). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may only be granted if (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of United States;" or if (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court expounded upon this language in *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, the Court explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir.2000) (citing *Williams*, 529 U.S. at 389-390). The Court in *Williams* further stated that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." [1] *Id.*

1. Ineffective Assistance of Trial Counsel for Failing to Present the Testimony of Kurtis Rainey

In his first (1st) claim, Petitioner contends that trial counsel was ineffective for failing to present the

1. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-389). "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citing *Williams*, 529 U.S. at 389).

testimony of Petitioner's brother, Kurtis Rainey, at trial. Claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court set forth the standard for a petitioner seeking habeas relief on the grounds of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

Because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In determining prejudice, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "[A] court need not

determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Id.*

"It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.' " *Williams*, 529 U.S. at 391. Thus, Petitioner is entitled to relief if the Pennsylvania courts' decision rejecting his claims of ineffective assistance of counsel was either "contrary to, or involved an unreasonable application of," that established law. *Id.* In finding that trial counsel's failure to call Kurtis Rainey was a reasonable, strategic decision, the Superior court stated, "Trial counsel testified he was aware of and investigated the allegations made by [Petitioner's] brother, and that counsel made a strategic decision not to present the brother's testimony without further support believing it would be harmful to [Petitioner's] case." *Commonwealth v. Rainey*, No. 2861 EDA 2002 at 6. Petitioner argues that Kurtis Rainey's possible testimony involved a potential second gunman, Kevin Williams. Petitioner asserts that his brother Kurtis was prepared to testify that Kevin Williams admitted to also shooting Kenneth White, and that Mr. Williams was in possession of a nine (9) millimeter firearm. During

Petitioner's PCRA hearing, counsel defended his decision not to call Kurtis Rainey as a witness:

> I tried to locate Kevin Williams, was unsuccessful. I thought there was a hearsay problem. I also thought that the bias of Kurtis Rainey would be harmful to his brother Karl given the fact that they were brothers.

N.T. 6/21/01 at 8. Clearly, counsel's decision not to call Kurtis Rainey was trial strategy. *See Hess v. Mazurkiewicz*, 135 F.3d 905, 908-909 (3d Cir.1998) (finding counsel not ineffective for failing to call witness because counsel reasonably could have believed that the prejudicial effect of testimony outweighed benefit to be gained).

Even assuming, however, that counsel's failure to call Kurtis Rainey was deficient, Petitioner presents no persuasive evidence that Kurtis Rainey's testimony would have changed the result of the trial. *Strickland*, 466 U.S. at 694 (to satisfy the prejudice requirement, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different). As the Superior Court noted:

> In light of [Petitioner's] admission at trial that he intended to shoot the victims, and the evidence that the cause of death was the result of multiple gunshot wounds and not any one isolated wound; the introduction of testimony

> by [Petitioner's] brother which referenced a second gunman would not have exonerated [Petitioner].

Commonwealth v. Rainey, No 2861 EDA 2002 at 5; *see also Commonwealth v. Rainey,* No. 0717 at 4 ("This court finds that further attempts by the trial counsel, as Petitioner contends the counsel should have taken, to establish the existence of the second shooter would not have made a difference in the outcome of the trial.") In light of the fact that testimony implicating Kevin Williams as the second shooter would not have changed the result of the trial, I find that the state court decision on this matter did not result in an unreasonable application of federal law as established by the United States Supreme Court. Accordingly, this claim must be denied.

2. Ineffective Assistance of Trial Counsel for Failing to Object to the Testimony of the Commonwealth's Ballistics Expert or to Obtain a Ballistics Expert for the Defense

In his second (2nd) claim, Petitioner contends that trial counsel was ineffective for for failing to object to the testimony of the Commonwealth's ballistics expert who stated that both the .380 and 9 mm bullets recovered at the crime scene could have been shot with the same handgun. Petitioner also argues that trial counsel was ineffective for failing to obtain a ballistics expert for the defense. Petitioner asserts that ballistics evidence could have established the existence of a second shooter.

Petitioner raised these issues on PCRA review and it was the subject of extensive testimony at the PCRA hearing. *See* N.T. 6/21/01, at 11-30. As discussed, *supra*, the PCRA court found that even if the existence of a second shooter had been established, it would have been irrelevant to the outcome of the trial, as the court established that Petitioner shot the unarmed victim multiple times. *Commonwealth v. Rainey*, No. 0717 at 4.[2]

I find that Petitioner has not established that trial counsel was ineffective for not objecting to the testimony of the Commonwealth's ballistics expert or for failing to obtain a ballistics expert for the defense. In support thereof, I note that in regard to objecting to the testimony of the Commonwealth's ballistics expert, trial counsel testified:

> When [Commonwealth's ballistics expert] testified and made it plain that he could not

---

2. When Petitioner raised this issue on appeal, the Superior Court found that the claim was improperly developed, and deemed it waived. Although it is arguable that this claim is unexhausted because it was not properly presented to the state court, *see O'Sullivan v. Boerckle*, 526 U.S. 838, 845 (1999) (to satisfy exhaustion requirement, habeas applicant must present federal claim to all segments of state appellate system in procedurally correct manner, so as to facilitate substantive review on state level); 28 U.S.C. 2254(b) (habeas relief is unavailable unless applicant exhausts state remedies first), I find it unnecessary to address the exhaustion argument as Petitioner's underlying claim is without merit.

> say one way or another whether [the bullets] were fired from one [1] gun or two [2] guns or more than two [2] guns, as a practical matter objecting to it really would not have served the purpose for a couple of reasons. Number one is that the jury already heard it. Two, I didn't want to emphasize it for the jury. And three is if I could save it for argument and say, listen, he wasn't able to say definitively one way or the other, his testimony has no weight and no significance.

See N.T. 6/21/01, at 20. Based on counsel's testimony, the decision not to object to the testimony could reasonably be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

As to hiring a ballistics expert for the defense, trial counsel testified at Petitioner's PCRA hearing that because no guns had been recovered, it was impossible for *any* ballistics expert to connect the bullets taken from the crime scene to any specific firearm. *See* N.T. 6/21/01, at 8. Again, under the circumstances, it was objectively reasonable for trial counsel to decide not to hire a ballistics expert for the defense. Nevertheless, even if trial counsel's representation was found to be objectively unreasonable, *Strickland* further requires that Petitioner establish how the results of the trial would have been different. *Id.* at 694. Petitioner has not asserted that an independent ballistics expert could offer any more information than the Commonwealth's expert. Petitioner argues that an independent ballistics expert

would testify that the shells and bullets collected from the crime scene *could* have been produced by two (2) separate firearms. See Pet'r Br., at 30. However, this is the same testimony that was offered at trial by the Commonwealth's ballistics expert. *See* N.T. 8/8/95, at 94. In light thereof, I find that Petitioner has not produced any evidence that would enable the court to conclude that there is a reasonable possibility that the outcome of the trial would have been different if trial counsel had engaged a ballistics expert for the defense. Accordingly, this claim must be denied.

3. PCRA Court Violated Petitioner's Due Process and Equal Protection Rights by Denying his Request for a Ballistics Expert

In his third (3rd) claim, Petitioner argues that the PCRA Court violated his due process and equal protection rights when it denied his request for a ballistics expert. The Superior Court found that the PCRA court did not abuse its discretion in denying Petitioner's request for a ballistics expert because Petitioner failed to offer reasonable support "as to how a ballistics expert would further [Petitioner's] argument regarding a second gunman." *Id.* Petitioner argues that the decision in *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985), requires a different finding. I disagree. The Supreme Court in *Ake* outlined three (3) factors to be used in determining whether the State must provide an indigent defendant with access to psychiatric assistance in preparing a defense. *Id.* Those three (3) factors are: the private interest that will be affected by the action of the

State; the governmental interest that will be affected if the safeguard is to be provided; and *the probative value of the additional safeguards* and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. *Id.* (emphasis added). As set forth in my review of Petitioner's second claim, Petitioner has failed to show the probative value of the additional safeguard, specifically the value of hiring an independent ballistics expert.[3] Therefore, I am in agreement with the state court that the denial of an appointment of a ballistics expert for the defense was not an abuse of the PCRA's court discretion. Accordingly, I find that Petitioner's Due Process and Equal Protection rights were not violated.

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3. I need not address whether *Ake* even applies outside the realm of trial court level psychiatric defense, as Petitioner fails to satisfy the three (3) part test.

APPENDIX D — MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA FILED SEPTEMBER 9, 2004

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2861 EDA 2002

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KARL RAINEY,

Appellant

Appeal from the PCRA Order entered June 4, 2002 in the Court of Common Pleas of Philadelphia County, Criminal Division, at No. 9412-0717

BEFORE: DEL SOLE, P.J., PANELLA and BECK, JJ.

MEMORANDUM: FILED SEPTEMBER 9, 2004

This is an appeal from the order denying Appellants petition under the Post Conviction Relief Act (PCRA). Appellant was convicted by a jury of first degree murder, aggravated assault and carrying a firearm on a public street. Appellant was sentenced to life in prison for first degree murder, and concurrent sentences of five to ten years for aggravated assault, and one to two years for

carrying a firearm on a public street. Appellant filed a direct appeal which resulted in an affirmance of his judgment of sentence. Following the denial of his petition for allowance of appeal with our Supreme Court, he filed a PCRA petition. Supplemental petitions were filed, followed by an evidentiary hearing after which the PCRA court denied Appellant relief. This appeal followed. We affirm.

Appellant raises four issues for our review. Appellant claims that the PCRA court erred when it failed to find counsel ineffective for failing to present the testimony of Kurtis Rainey and failing to challenge the Commonwealth's ballistics experts or retain an expert. Also, Appellant claims the PCRA court abused its discretion in not permitting him to retain the services of an expert ballistics examiner. Finally, he alleges the PCRA court erred in concluding that trial counsel's failure to raise on appeal the issue of a juror's recantation of the verdict was not ineffective assistance of counsel.

Prior to addressing these issues, we will first address Appellant's response to this Court's order to show cause why this appeal should not be quashed as untimely. The deadline for Appellant to file his notice of appeal was July 4, 2002. Appellant's notice of appeal was post-marked on July 5, 2002, and received by the court on July 8, 2002. Appellant asserts that because July 4 was a holiday, he had until July 5 to file his notice of appeal. We agree.

Appendix D

As stated in 1 Pa.C.S.A. § 1908; "[w]hen any period of time is referred to in any statute ... [and] the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth ... such day shall be omitted from computation." Further under the "prisoner mailbox rule" Appellant's appeal is deemed filed on the date he placed his notice of appeal in the institutional mailbox, or delivered it to prison authorities. *Commonwealth v. Jones*, 700 A.2d 423 (Pa. 1997). Accordingly, since the record indicates Appellant's notice of appeal was post-marked July 5, 2002, it is therefore deemed timely and we will address the merits of Appellant's appeal.

Appellant first asserts that the PCRA court erred by not finding his trial counsel provided ineffective assistance when he failed to present testimony from Kurtis Rainey, Appellant's brother, describing admissions made by Kevin Williams regarding the victim's death.

It is generally accepted that to prevail on a claim that counsel was constitutionally ineffective, the appellant must overcome the presumption of competence by showing that: (1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate appellant's interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different. A failure to satisfy any one prong of the test for ineffectiveness will require rejection of the claim.

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Commonwealth v. Wharton, 811 A.2d 978 (Pa. 2002) (citations omitted).

Appellant testified he intended to fire several shots from a .380 caliber pistol at the decedent and his friend Ervin Boyd, the victim of the aggravated assault, but that he did not fire the final shots at either victim. The medical examiner identified eight gunshot wounds on the decedent, and the hospital treated three gunshot wounds on Mr. Boyd. The medical examiner testified that "[t]he cause of death was multiple gunshot wounds to the chest and the abdomen and the back." N.T., 8/8/95, at 127. The Commonwealth presented testimony by an expert ballistics examiner that although both .380 and 9mm caliber bullets were recovered from the victims, it was possible for both types of bullets to be fired from the same gun.

Appellant asserts that it was a second gunman, Kevin Williams, who fired the 9mm shots into the victims. Appellant claims he was prejudiced when his counsel failed to present Kurtis Rainey's testimony that he observed Williams with a silver-plated 9mm pistol, and that Williams admitted to Rainey after the incident that "[y]our brother shot them and then I finished it." N.T., 6/21/01, at 32. The Commonwealth argues that the presence of a second gunman, if true, is irrelevant and could not exonerate Appellant of his crimes, but only create the inference of shared criminal intent that would have no bearing on the outcome of the case.

Appendix D

"In order to make a claim of ineffectiveness for failure to interview or present a witness, a petitioner must demonstrate: (1) the existence and availability of the witness; (2) counsel's awareness of, or duty to know of, the witness; (3) the willingness and ability of the witness to cooperate and appear on behalf of the defendant; and (4) the necessity of the proposed testimony in order to avoid prejudice." *Commonwealth v. Priovolos,* 715 A.2d 420, 422 (Pa. 1998) (citing *Commonwealth v. Morales,* 701 A.2d 516 (Pa. 1997)).

Appellants trial attorney testified at the PCRA hearing that he did meet and discuss with Kurtis Rainey the alleged confession by Kevin Williams, and that he investigated the allegation extensively. Upon failing to either locate Mr. Williams or to verify the validity of the confession, trial counsel elected not to present the testimony fearing the bias of Appellant's brother might harm the case.

Our standard of review of a post conviction court's denial of relief is limited to whether the lower court's determination is supported by the evidence of record and whether it is free of legal error. *Commonwealth v. Harmon,* 738 A.2d 1023 (Pa. Super. 1999). We find Appellant is unable to demonstrate he was prejudiced by counsel's actions in failing to present Kurtis Rainey as a witness. In light of Appellants admission at trial that he intended to shoot the victims, and the evidence that the cause of death was the result of multiple gunshot wounds and not any one isolated wound; the introduction of testimony by Appellant's brother which referenced a

second gunman would not have exonerated Appellant. As such, Appellant's accusation of ineffective assistance of counsel fails because the underlying argument is without merit. Furthermore, it is well established that ineffective assistance of counsel will not be found where there is a reasonable basis for counsel's decision based on a matter of trial strategy. *Commonwealth v. Rivera*, 454 A.2d 1067 (Pa. Super. 1982). Trial counsel testified he was aware of and investigated the allegations made by Appellant's brother, and that counsel made a strategic decision not to present the brother's testimony without further support believing it would be harmful to Appellant's case. We find the evidence supports the PCRA court's decision, and the decision is without legal error.

Appellant further contends that trial counsel wrongly failed to challenge the Commonwealth's ballistics expert testimony and failed to retain an expert on Appellant's behalf.

In reviewing Appellant's brief in support of this challenge, we find the argument presented to be improperly developed as it offers no basis as to how an expert would testify in support of Appellant's case. The core of the argument states merely that an expert "could have offered testimony designed to advance his cause." Where an issue has been identified on appeal but is unsupported by a properly developed argument in Appellant's brief it can be considered waived. *Commonwealth v. Rodgers*, 605 A.2d 1228 (Pa. Super. 1992); *Commonwealth v. Nelson*, 567 A.2d 673 (Pa. Super. 1989).

Nevertheless, we find the claim, even if further developed, to be without merit. The Commonwealth's ballistics expert testified at trial that a single gun, or any number of guns, could have fired the .380 and 9mm bullets; the scientific evidence was insufficient to make a conclusion. During the PCRA hearing, Appellant's trial counsel testified he believed the ballistics testimony carried no weight, and because no gun or guns were ever recovered, it was not possible to positively compare the bullets retrieved from the victims to any gun. In counsel's opinion, it was in Appellant's best interest not challenge this testimony so as not to re-emphasize it to the jury, and instead he chose to address it in his closing argument where he could point out its lack of significance. The PCRA court found trial counsel had a reasonable basis designed to effectuate Appellant's interests under the given circumstances, and Appellants trial counsel did not provide ineffective assistance. We find no basis to disturb this ruling.

Appellant next contends the PCRA court abused its discretion by not permitting him to retain the services of a ballistics expert. Appellant argues that without public funding to hire an expert, he is unable to support his theory of a second gunman. We disagree.

The appointment of an expert witness or an investigator to assist in the preparation of a defense is vested in the sound discretion of the trial court and denial thereof will not be disturbed without a finding that the court abused its discretion. *Commonwealth v. Gelormo*, 475 A.2d 765 (Pa. Super. 1984). Based on our review of

Appellant's previous issue, we find there is no reasonable support as to how a ballistics expert would further Appellant's argument regarding a second gunman. As such, the PCRA court did not abuse its discretion in denying Appellants request to retain a ballistics expert.

Finally, Appellant contends the PCRA court erred by not finding his trial counsel ineffective for failing to raise the issue of a juror's recantation of the verdict on direct appeal. The order of events at trial were as follows: the jury submitted its verdict in open court; the jury was polled upon the request of Appellant whereby all members concurred; the verdict was recorded; the jury acknowledged in the affirmative the verdict as recorded; and the jury was discharged to reconvene the following day for sentencing. The following day, prior to the sentencing hearing beginning, one juror recanted his verdict on his own volition. Appellant contends that even though the verdict was duly recorded, it may still be challenged until the jury has been separated and dispersed.

Appellant relies on the Supreme Court case *of Commonwealth v. Downey* that held '[a] motion to poll, be it made at the moment the verdict is first announced in court, or even if made after the verdict is *affirmed and* 'entered' of record, is still timely so long as it is made before the *jury* has dispersed." *Commonwealth v. Downey,* 732 A.2d 593, 595 (Pa. 1999). Appellant's argument is not relevant in the instant case because unlike the cases relied upon in his brief, the jury was polled and all members concurred with the guilty verdict prior to their discharge.

Further, as noted by the PCRA court, even though the same members of the jury were to reconvene for sentencing the following day, they were effectively discharged from the guilt phase of the trial. The law is clear, that after a jury verdict is duly recorded and the jury has been discharged, individual jurors may not invalidate or impeach their verdict by their own testimony without claiming outside influence. *Commonwealth v. Patrick*, 206 A.2d 295 (Pa. 1965); Commonwealth *v. Spencer*, 393 A.2d 895 (Pa. Super. 1978); *Commonwealth v. Stark*, 526 A.2d 383 (Pa. Super. 1987).

Accordingly, as the underlying claim was without merit, the PCRA court properly ruled Appellant's counsel was not ineffective for failing to present it on direct appeal.

Order affirmed.

Judgment Entered

s/ [illegible]
Prothonotary

Date: September 9, 2004

APPENDIX E — OPINION OF THE COURT OF COMMON PLEAS, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, TRIAL DIVISION, CRIMINAL SECTION DATED NOVEMBER 17, 2003

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF
PENNSYLVANIA, TRIAL DIVISION -
CRIMINAL SECTION

C.P. 9412

NO. 0717

COMMONWEALTH OF PENNSYLVANIA

V.

KARL RAINEY

OPINION

MAZZOLA, J.

The facts established at trial are as follows. Petitioner, Karl Rainey, and the decedent, Kenneth White, had a prior history of confrontations. On November 19, 1994, White followed Petitioner out from a bar and attempted to provoke a confrontation. When Petitioner had reached his parked vehicle, he pulled out his gun and shot White multiple times. Petitioner then shot White's friend Ervin Boyd who tried to intervene. Petitioner then returned to shoot at the back of White

who had fallen to the ground. Petitioner then shot at Boyd multiple times, and got into his car and drove off, dragging Boyd's body approximately one city block. Boyd survived his wounds.

At trial, Petitioner contended that he had shot White and Boyd in self defense, but that another gunman then jumped in to shoot White and Boyd multiple times.

On August 10, 1995, Petitioner was convicted of first degree murder, aggravated assault, and possession of an instrument of crime. The next day, the jury imposed a sentence of life imprisonment on the murder conviction, and the court imposed concurrent sentences of five to ten years for the aggravated assault conviction and six to twelve months for possessing an instrument of crime.

Superior Court affirmed trial court's judgment of sentence on January 16, 1997, and the Supreme Court denied allocatur on November 3, 1997.

On October 30, 1998, Petitioner filed a *pro se* petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. The PCRA court appointed counsel, Harvey L. Anderson, Esq., and he filed an amended petition on June 8, 2000. Petitioner now appeals the dismissal, on June 4, 2002, of his amended petition.

Petitioner, in his amended petition and supplements thereto, alleged that he was provided ineffective assistance of counsel for the following reasons: (1) trial counsel failed to call his brother, Kurtis Rainey, as a

witness; (2) trial counsel failed to obtain a ballistics expert; (3) trial counsel failed to object to the testimony of the Commonwealth's ballistic expert; (4) appellate counsel failed to raise on appeal trial court's refusal to grant a bench trial; (5) appellate counsel failed to raise on appeal the issue of jury recantation; (6) trial counsel failed to object to prosecutor's improper remarks during closing argument.

LEGAL ANALYSIS

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness. *Commonwealth v. Green,* 551 Pa. 88, 93 (1998).

Having failed on his appeal where he challenged the verdict on self defense grounds, Petitioner now contends that he cannot be guilty of first degree murder because White died due to multiple gunshot wounds inflicted by him and an alleged second shooter. It seems that Petitioner is claiming that his actions were not the "but for" cause of White's death, and therefore he cannot be guilty of first degree murder. Yet while the two gunmen theory could only go to causation, and not the mental state, Petitioner inexplicably says that he could at best be convicted of voluntary manslaughter. Since the mental state, and not causation, differentiates first degree murder from voluntary manslaughter, this court cannot

see the logic behind Petitioner's argument. It seems that Petitioner is attempting to say, through his reliance on the two gunmen theory, that the evidence was insufficient to establish first degree murder. However, Petitioner challenged the sufficiency of the evidence on appeal, and thus he cannot raise this issue again. *See* 42 Pa.C.S. § 9543(a)(3) (stating that to be eligible for relief under the PCRA, the allegation of error must not have been previously litigated or waived). Accordingly, this claim was properly dismissed.

Moreover, it was established at trial that Petitioner shot White multiple times, therefore the existence of a second shooter who also shot White multiple times would not have made a difference to Petitioner's murder conviction. Further, because no witnesses testified that White was armed, the existence of the second shooter would not have made a difference to Petitioner's self defense claim. This court finds that further attempts by the trial counsel, as Petitioner contends the counsel should have taken, to establish the existence of the second shooter would not have made a difference in the outcome of the trial. Accordingly, Petitioner's claims related to the possible existence of the second shooter were properly dismissed. *See Green, supra.*

Petitioner contends that the trial judge abused his discretion in denying Petitioner's request for a bench trial. However, a defendant does not have an absolute right to a bench trial. *See Commonwealth v. Sorrell*, 500 Pa. 355, 359 (1982) ("[T]he decision whether to permit a non-jury trial is to be made by the court, taking into

account all relevant considerations."). After reviewing the trial record, this court finds that the trial court considered the proposed evidence and the proposed defense, and decided that a jury trial would serve Petitioner's interests better than a bench trial. Therefore, the trial court did not abuse it's discretion in denying the request for a bench trial. *See Commonwealth v. Boyd*, 320 Pa. Super. 560, 563 (1983) (Stating that trial judge has discretion to decide whether to approve request for a waiver trial.).

Petitioner, nevertheless, claims that he is entitled to a new trial since the trial judge did not state on the record the reason for denying his waiver request. The trial court should state its reason for the denial of waiver so that an appellate court can decide whether trial court abused its discretion. *See Boyd*, 320 Pa. Super. at 563 ("If the court decides to disapprove the waiver, it should state the reasons for its decision, so that on any further appeal we may decide whether it has acted within its discretion."). In the instant case, the reason for denying the waiver is discernable from the record. Therefore, Petitioner's claim is without merit, and properly dismissed.

Petitioner also asserts that the appellate counsel should have raised on appeal the trial court's denial of Petitioner's motion for a mistrial based on a juror's attempt to impeach the verdict after it was recorded. Petitioner contends that a juror can impeach the verdict, even after the verdict has been recorded, if it is before the jury is discharged. However, this Court finds

persuasive the Commonwealth's argument that if Petitioner's argument is accepted, then in any case where the jury is retained for a separate penalty phase, the recorded verdict would be impeachable until the penalty phase is over and the jury is physically discharged. Such a result would be absurd.

In the instant case, a juror tried to impeach the verdict, the day after the verdict had been recorded, without claiming any outside influence. The Supreme Court in *Commonwealth v. Patrick,* 416 Pa. 437, 442 (1965), stated that, "Our Courts have repeatedly held for over 150 years that after a verdict is recorded, and after the jury has separated and been discharged, jurors may not invalidate or impeach a verdict by their own testimony." In the instant case, when the verdict was recorded and the jury dismissed for the day with the penalty phase set to begin the next day, the jury had effectively been discharged from the trial phase. Therefore, the trial court acted properly in denying the juror's attempt to impeach the verdict. Accordingly, Petitioner's claim with regard to this matter was properly dismissed.

Next, Petitioner asserts that the prosecutor engaged in misconduct in his closing argument by stating that if Petitioner's gun were to be found, then the jury would know that the Petitioner shot all the bullets. However, the prosecutor is entitled to respond fairly to a defendant's closing argument. *See Commonwealth v. Hawkins,* 549 Pa. 352, 393 (1997) ("[T]he prosecutor is entitled to fairly respond to evidence presented by the

defendant or to closing remarks made by defendant's counsel."). This court finds that the prosecutor's comments were a fair response to Petitioner's closing argument where the trial counsel stated that Petitioner discarded his weapon not because he was afraid of the possibility of ballistics examination showing that he fired all the shots, but because he was simply afraid. Moreover, a prosecutor's comments do not constitute reversible error "unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." *Id.* at 373. Since the prosecutor's comments were a fair response to the Petitioner's closing argument, and since Petitioner failed to show the requisite prejudice, Petitioner's claim with respect to the prosecutor's comments was properly dismissed.

CONCLUSION

After thorough consideration, none of the claims raised by the Petitioner warranted granting of relief. Accordingly, this court's dismissal of Petitioner's amended PCRA petition should be affirmed.

BY THE COURT:

s/ [illegible]
J.

APPENDIX F — MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA FILED JANUARY 16, 1997

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 4275 PHILADELPHIA 1995

COMMONWEALTH OF PENNSYLVANIA

v.

KARL RAINEY,

APPELLANT

Appeal from the Order entering Judgment of Sentence December 8, 1995 in the Court of Common Pleas of Philadelphia County, Criminal Division, at No. C.P. 94-12-0717.

BEFORE: DEL SOLE, SCHILLER AND CERCONE, JJ.

MEMORANDUM:

Appellant Karl Rainey was convicted by a jury of first degree murder, aggravated assault and possession of an instrument of crime. He received a sentence of life imprisonment for the murder conviction, and concurrent sentences of five to ten years for the aggravated assault conviction and six to twelve months for PIC. Appellant's post-sentence motions were denied. This appeal followed. We affirm.

Appendix F

Appellant presents the following issues for our review: (1) whether there was sufficient evidence to prove first degree murder; and (2) whether the verdict was against the weight of the evidence.

In advancing his sufficiency of the evidence claim, Appellant argues specifically that the Commonwealth failed to prove beyond a reasonable doubt that he did not act in self-defense.

The test for determining the sufficiency of the evidence is to view the evidence in the light most favorable to the verdict winner to determine whether the fact finder reasonably could have concluded that all of the elements of the crime were established beyond a reasonable doubt. *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991).

When a self-defense claim is raised at trial, the Commonwealth, in order to negate the claim, is required to prove beyond a reasonable doubt at least one of the following: either that a defendant's belief that it was necessary to kill the victim in order to protect himself from death or serious bodily harm was unreasonable, that the defendant provoked the use of force, *or* that the defendant had a duty to retreat and could safely do so. *Commonwealth v. Upsher*, 497 Pa. 621, 444 A.2d 90 (1982), *Commonwealth v. Gonzales*, 415 Pa.Super. 564, 609 A.2d 1368 (1992).

Self-defense issues of whether a defendant acted out of an honest, bona fide belief that he was imminent

danger and whether such belief was reasonable are questions properly resolved by the finder of fact. *Commonwealth v. Hill,* 427 Pa.Super. 440, 629 A.2d 949 (1993).

The facts establish that Appellant and the Decedent Kenneth White had several verbal confrontations prior to the night of the murder. On the night in question, Appellant was leaving a bar when Decedent and his friend Ervin Boyd were entering the bar. Appellant and Decedent began to argue as Appellant walked to his car. Boyd followed along. Upon arriving at his car, Appellant pulled a gun from his jacket and shot Decedent several times. Appellant then shot Boyd who hid behind a parked car. Appellant cleared a jam in his gun, returned to Decedent's body and fired three more shots into Decedent's back. Then, Appellant found Boyd and shot him three more times. As Appellant fled from the scene, he ran over Boyd and dragged him one block from the scene. Boyd survived and Decedent bled to death. No weapon was found on or near Decedent's body.

Appellant claims that he was in fear of his life. However at trial, Appellant admitted shooting the victim even though he knew the victim was unarmed. Furthermore, once the Decedent was helpless on the ground, Appellant returned to shoot him several more times. This evidence is more than sufficient for the jury to find that it was unreasonable for Appellant to believe that it was necessary to kill Decedent to protect himself from death or serious bodily harm. Therefore, this issue is meritless.

Appendix F

Next, Appellant questions whether the verdict was against the weight of the evidence. In reviewing such a claim, a new trial will not be warranted unless the verdict was so contrary to the evidence as to shock one's sense of justice. *Commonwealth v. Whitney,* 511 Pa. 232, 512 A.2d 1152 (1986). Also, the finder of fact is free to believe all, part, or none of the evidence. *Commonwealth v. Fahy,* 512 Pa. 298, 516 A.2d 689 (1986).

The jury, as fact finder, chose to believe the evidence presented by the Commonwealth, as was its right. This evidence, although contradicted, was weighty enough for the jury to issue the guilty verdicts and Appellant's argument to the contrary is meritless.

Judgment of sentence affirmed.